

STATE OF CALIFORNIA

Public Utilities Commission  
San Francisco

**M e m o r a n d u m**

**Date:** April 20, 2004

**To:** The Commission  
(Meeting of April 22, 2004)

**From:** Alan LoFaso, Director  
Office of Governmental Affairs (OGA) — Sacramento

**Subject: AB 1169 (Bermudez) Public utilities: telephone corporations:  
disposition of property.  
As amended March 1, 2004**

**Legislative Subcommittee Recommendation:** None.

**Summary:** This bill would statutorily exempt telephone corporations from specified requirements under Section 851 of the Public Utilities Code.

**Digest:** Existing law, P.U. Code sec. 851 et. seq., requires Commission approval, as specified, before any public utility may dispose or encumber specified property or assets necessary or useful in the performance of the utility's duties to the public.

This bill would define, for telephone corporations, property or assets "necessary or useful in the performance of its duties to the public" as "an operational property or asset owned by the telephone corporation that is essential to the delivery of service to end users, on a wholesale or retail basis" according to specified criteria, including a telephone corporation's present obligation to make the property or asset available to wholesale telecommunications providers for service to end users.

This bill would exempt a telephone corporation from the requirement to seek Commission approval to dispose of or encumber specified property or assets designated by the utility as not "necessary or useful in the performance of its duties to the public", if the property or asset meets specified criteria.

This bill would further exempt from Commission approval a telephone corporation disposal or encumbrance of a property or asset with a fair market value of less than \$5,000,000, if the utility has no present obligation to make the asset available to any wholesale telecommunications provider to provide services to end users.

This bill would require the Commission to permit telephone corporations to file for disposal of a property or asset with a fair market value in excess of \$5,000,000 via advice letter, according to Commission Rules of Practice and Procedure, including protest procedures, while retaining Commission authority to treat an advice letter filing as an application in specific cases or to eliminate the filing requirement entirely for specified classes of filings.

**Analysis:** (provided by Telecommunications Division): The Commission already has effective mechanisms in place to oversee asset transfers including PU Code 851, General Order 69-C, and Gain of Sale of Land rules. These rules provide necessary and efficient oversight for asset transfers that would be more difficultly addressed in an Advice Letter filing. Moreover, the Commission has recently opened up an investigation to revisit its gain on sales rules, so legislative intervention is not necessary.

The Advice Letter (AL) filing mechanism is designed to efficiently handle non-controversial administrative filings. Asset transfers, particularly those involving affiliate transfers, are, however, frequently highly controversial, especially with regard to subsidization of competitive markets by monopoly market revenues. This AL mechanism is ill suited to address arguments that challenge policies and factual points associated with these transfers.

This bill can effectively eliminate judicial review of extremely complicated asset transfers, including those over \$5,000,000, if they are broken down into components of less than \$5,000,000 or if the transfers are made in consideration of their per unit value,. For example, the yellow pages business could be transferred to an affiliate because the value of the yellow pages books on hand is \$2 each (which could be transferred individually via AL), even though the business, if sold on the open market may be worth over \$2 billion. Moreover, a \$9 million property could be divided into two pieces of \$4.5 million to avoid a Commission review

The \$5 million cutoff point is arbitrary and potentially material for some carriers while being immaterial for others. However, generally this figure is rather high and would eliminate almost all assets from responsible oversight by the Commission.

- The bill may increase the number of AL filings and the time spent by TD staff on contested filings (assuming telephone utilities don't manipulate the asset transfer loophole to fall below \$5 million).
- The bill is prone to exploitation by a parting out loophole whereby a greater than \$5 million asset can be broken down into smaller than \$5 million parts and transferred without full Commission review.
- This bill is anticipated to require an expansion of the advice letter processing portion of the Telecommunications Division, if expected protests from interested parties

require staff to conduct audits and financial analyses to ascertain validity of protest assertions.

## **LEGISLATIVE HISTORY**

AB 1169 passed the Assembly 77-0 on May 27, 2003 in another form. The bill was amended to its current form on March 1, 2004. It is currently pending in the Senate Energy, Communications, and Utilities Committee.

## **SUPPORT/OPPOSITION**

Support: Verizon (sponsor); SBC

Opposition: None on file.

## **LEGISLATIVE STAFF CONTACT**

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**Date:** April 20, 2004

**BILL LANGUAGE:**

BILL NUMBER: AB 1169    AMENDED  
BILL TEXT

AMENDED IN SENATE    MARCH 1, 2004  
AMENDED IN SENATE    JULY 1, 2003  
AMENDED IN ASSEMBLY    MAY 1, 2003

INTRODUCED BY    Assembly Member Bermudez

FEBRUARY 21, 2003

An act to amend Section ~~366.1~~ 851 of  
the Public Utilities Code, relating to ~~electric power~~  
public utilities .

LEGISLATIVE COUNSEL'S DIGEST

AB 1169, as amended, Bermudez. ~~Aggregation: Magnolia~~  
~~Power Project~~ Public utilities: telephone  
corporations: disposition of property .

Under existing law, the Public Utilities Commission has regulatory authority over public utilities, including telephone corporations. Under the existing Public Utilities Act, a public utility is required to seek commission approval prior to selling, leasing, assigning, mortgaging, or otherwise disposing of or encumbering any property necessary or useful in the performance of its duties to the public.

This bill would provide that a property or asset that is necessary or useful in the performance of a telephone corporation's duties to the public is a property or asset that is essential to the delivery of service to end users, on a wholesale or retail basis, when the property or asset is currently and actively being used to provide service to end users, the telephone corporation has a present intention to use the property or asset to provide service to end users, or the telephone corporation has an obligation to make the property or asset available to wholesale telecommunications providers to provide service to end users. The bill would authorize a telephone corporation to designate certain property or asset as surplus and not necessary or useful in the performance of its duties to the public and the telephone corporation would not be required to obtain the commission's approval to dispose of or encumber that surplus property or asset. The bill would authorize a telephone corporation to dispose of or encumber any property or asset with a fair market value of less than \$5 million if the telephone corporation has no present obligation to make the property or asset available to any wholesale telecommunications provider to provide service to end users. As to any property with a fair market value of \$5 million or more, the bill would require the commission to permit a telephone corporation to make a filing to dispose of the property or asset in accordance with the procedures adopted by the commission in the commission's Rules of Practice and Procedure applicable to advice letter filings. The bill would require the commission to apply those procedures in issuing a resolution to the filing, including the procedures relating to protests. The bill would authorize the commission to treat an advice letter filing as an

*application filing in specific cases.*

~~Under existing law, a city with rights and obligations to the Magnolia Power Project, as defined, may serve as a community aggregator on behalf of all retail end use customers within its jurisdiction, if the project has been constructed and is otherwise capable of beginning deliveries of electricity to the existing project participants, as defined.~~

~~This bill would make changes to reflect that the project is being constructed. The bill would modify the definition of the term "existing project participant" to mean the Magnolia Power Project B participant, as defined in lease revenue bonds issued for the project. The bill would specifically authorize an existing project participant to serve as a community aggregator on behalf of all electric service accounts of the ABC Unified School District.~~

Vote: majority. Appropriation: no. Fiscal committee:  
~~no~~ yes . State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section ~~366.1~~ 851 of the Public Utilities Code is amended to read:

~~366.1. (a) As used in this section, the following terms have~~

851. (a) No public utility other than a common carrier by railroad subject to Part 1 of the Interstate Commerce Act (Title 49, U.S.C.) ~~shall~~ may sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it ~~so to do~~ to do so . Every ~~such~~ sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing with Section 1001) of Chapter 5 of this part, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article ~~shall~~ does not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture.

Nothing in this section ~~shall prevent~~ prevents the sale, lease, encumbrance or other disposition by any public utility of property ~~which~~ that is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property ~~which~~ that is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with ~~such~~ the property in good faith for value ; ~~provided, however, that nothing in this~~

~~section shall~~ . This section does not apply to the interchange of equipment in the regular course of transportation between connecting common carriers.

(b) For a telephone corporation, a property or asset that is "necessary or useful in the performance of its duties to the public" under subdivision (a), means an operational property or asset owned by the telephone corporation that is essential to the delivery of service to end users, on a wholesale or retail basis, and is any of the following:

(1) The property or asset is currently and actively being used by the telephone corporation to provide service to end users.

(2) The telephone corporation has a present intention to use the property or asset to provide service to end users.

(3) The telephone corporation has a present obligation to make the property or asset available to wholesale telecommunications providers to provide service to end users.

(c) A telephone corporation may designate, wholly or partially, any property or asset as surplus and not "necessary or useful in the performance of its duties to the public" pursuant to subdivision (a), if the property or asset is any of the following:

(1) The property or asset consists of vacant or unused office or administrative space.

(2) The property or asset consists of vacant or unused space on a utility pole or tower or in utility conduit, provided that the telephone corporation complies with all other applicable statutory provisions and commission general orders regarding pole, tower, and conduit attachments.

(3) The property or asset consists of vacant or unimproved real estate that the telephone corporation does not have a present intention to use to provide service to end users, or does not have a present obligation to make available to wholesale providers to provide service to end users.

(4) The property or asset is accounted for as a nonoperating asset on the books of the telephone corporation.

(5) The property or asset is no longer being actively used by the telephone corporation or a wholesale telecommunications provider to provide service to end users, and the telephone corporation has no present intention to use the property or asset to provide service to end users, or no present obligation to make the property or asset available to wholesale telecommunications providers to provide service to end users.

(d) A telephone corporation is not required to obtain commission approval prior to disposing of or encumbering any property or asset with a fair market value of less than five million dollars (\$5,000,000), if the telephone corporation has no present obligation to make the property or asset available to any wholesale telecommunications provider to provide service to end users.

(e) The commission shall permit a telephone corporation to make a filing to dispose of a property or asset with a fair market value in excess of five million dollars (\$5,000,000), as required in subdivision (a), in accordance with the procedures adopted by the commission in the commission's Rules of Practice and Procedure applicable to advice letter filings. The commission shall apply those procedures in issuing a resolution to a filing under this subdivision, including the procedures relating to protests. The commission retains authority to treat an advice letter filing as an application filing in specific cases, and to eliminate the filing requirement altogether for classes of filings under this section.

(f) A telephone corporation is not required to obtain commission

approval to dispose of or encumber property or assets that are surplus under subdivision (c). ~~the following meanings:~~

~~—(1) "Department" means the Department of Water Resources with respect to its power program described in Chapter 2 (commencing with Section 80100) of Division 27 of the Water Code.~~

~~—(2) "Existing project participant" means the Magnolia Power Project B participant, as defined in the Magnolia Power Project B lease revenue bonds, issued on March 15, 2003.~~

~~—(3) "Magnolia Power Project" means a natural gas fired electric generating facility being constructed at an existing site in Burbank and for which an application for certification has been approved by the State Energy Resources Conservation and Development Commission and for which a certificate to construct and operate has been granted.~~

~~—(b) Notwithstanding Section 80110 of the Water Code or any commission decision ordering the suspension of direct access, if the Magnolia Power Project has been constructed and is otherwise capable of beginning deliveries of electricity to the existing project participants, an existing project participant may serve as a community aggregator on behalf of all retail end use customers within its jurisdiction, including all electric service accounts of the ABC Unified School District. Nothing in this section may be construed to restrict the existing project participant to reliance solely on output from the Magnolia Power Project in its right to serve all retail end use customers within its jurisdiction.~~

~~—(c) Subdivision (b) may not become operative until both of the following occur:~~

~~—(1) The commission implements a cost recovery mechanism, consistent with subdivision (d), that is applicable to customers that elected to purchase electricity from an alternate provider between February 1, 2001, and January 1, 2003.~~

~~—(2) The commission submits a report certifying its satisfaction of paragraph (1) to the Senate Energy, Utilities and Communications Committee, or its successor, and the Assembly Committee on Utilities and Commerce, or its successor.~~

~~—(d) (1) It is the intent of the Legislature that each retail end use customer that has purchased power from an electrical corporation on or after February 1, 2001, should bear a fair share of the department's power purchase costs, as well as power purchase contract obligations incurred as of January 1, 2003, that are recoverable from electrical corporation customers in commission approved rates. It is the further intent of the Legislature to prevent any shifting of recoverable costs between customers.~~

~~—(2) The Legislature finds and declares that this subdivision is consistent with the requirements of Section 360.5 and Division 27 (commencing with Section 80000) of the Water Code, and is therefore declaratory of existing law.~~

~~—(e) A retail end use customer purchasing power from a community aggregator pursuant to subdivision (b) shall reimburse the department for all of the following:~~

~~—(1) A charge equivalent to the charge that would otherwise be imposed on the customer by the commission to recover bond related costs pursuant to an agreement between the commission and the department pursuant to Section 80110 of the Water Code. That charge shall be payable until all obligations of the department pursuant to Division 27 (commencing with Section 80000) of the Water Code are fully paid or otherwise discharged.~~

~~—(2) The costs of the department, equal to the share of the~~

~~department's estimated net unavoidable power purchase contract costs attributable to the customer, as determined by the commission, for the period commencing with the customer's purchases of electricity from a community aggregator, through the expiration of all then existing power purchase contracts entered into by the department.~~

~~—(f) A retail end use customer purchasing power from a community aggregator pursuant to subdivision (b) shall reimburse the electrical corporation that previously served the customer for all of the following:~~

~~—(1) The electrical corporation's unrecovered past undercollections, including all financing costs attributable to that customer, that the commission lawfully determines may be recovered in rates.~~

~~—(2) The costs of the electrical corporation recoverable in commission approved rates, equal to the share of the electrical corporation's estimated net unavoidable power purchase contract costs attributable to the customer, as determined by the commission, for the period commencing with the customer's purchases of electricity from the community aggregator, through the expiration of all then existing power purchase contracts entered into by the electrical corporation.~~

~~—(g) (1) A charge or cost imposed pursuant to subdivision (c), and all revenues received to pay the charge or cost, shall be the property of the department. A charge or cost imposed pursuant to subdivision (f), and all revenues received to pay the charge or cost, shall be the property of the particular electrical corporation. The commission shall establish mechanisms, including agreements with, or orders with respect to, electrical corporations necessary to ensure that the revenues received to pay a charge or cost payable pursuant to this section are promptly remitted to the party entitled to those revenues.~~

~~—(2) A charge or cost imposed pursuant to this section shall be nonbypassable.—~~